

United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:

Michael Joseph Anderson,
Debtor.

Case No. 05-40892-R
Chapter 7

Virginia Ditty and Chris Ditty,
Plaintiff,

v.

Adv. No. 06-4606

Michael Joseph Anderson,
Defendant.

Opinion Regarding Defendant's Motion for Partial Summary Judgment

This matter is before the Court on defendant Michael Joseph Anderson's motion for partial summary judgment. The plaintiffs, Virginia Ditty and Chris Ditty, filed an objection. The Court conducted a hearing on June 22, 2006, and took the matter under advisement.

I.

Chris Ditty and Anderson were engaged in a business together known as Paradyme Motorsports, LLC. Anderson incorporated Paradyme in 2003. From September 2003 through 2005, Chris Ditty was the manager of Paradyme. At the request of Chris Ditty and Anderson, Virginia Ditty, who is Chris Ditty's mother, loaned funds to Paradyme amounting to approximately \$700,000. The business closed in 2005.

Virginia Ditty and Chris Ditty sued Paradyme and Anderson in the Macomb County Circuit Court, alleging fraud, breach of loan agreement, piercing the corporate veil, wrongful distribution

and lost salary. The Dittys obtained a default judgment for \$743,093.43.

Anderson filed for chapter 7 relief on January 26, 2006. On May 1, 2006, the Dittys filed this adversary complaint to determine dischargeability of debt pursuant to § 523(a)(2)(A), (a)(4), and (a)(6). The Dittys also seek to pierce the corporate veil and allege wrongful distribution to the debtor.

The complaint further alleges that Anderson represented to Chris Ditty that he would be an equal partner in Paradyme, however, Anderson did not properly set up the company with Ditty as an equal partner. The complaint alleges that Anderson misappropriated funds from Paradyme, preventing the generation of income to repay Virginia Ditty.

II.

A.

Anderson seeks summary judgment on all counts as to Chris Ditty and on the § 523(a)(4) and (a)(6) counts as to Virginia Ditty.

Anderson contends that he offered to make Chris Ditty a partner, but Chris declined. Anderson asserts that Chris never made any contributions of money or property to Paradyme and was merely an employee. Anderson argues that in September of 2005, Chris Ditty physically forced Anderson to abandon Paradyme and took \$300,000 in money and property from the company. Anderson asserts that Chris is not using that money to repay his mother but is using it for himself. Anderson argues that he never had a fiduciary relationship with either plaintiff.

Anderson contends that Chris Ditty is judicially estopped from asserting an ownership interest in Paradyme because in 2004 Chris Ditty filed a chapter 7 petition and did not disclose any interest in Paradyme.

Anderson also contends that Chris Ditty did not loan any money to Paradyme or Anderson and is not a creditor of Paradyme or Anderson. Therefore, Anderson argues, Chris Ditty should be dismissed as a plaintiff.

With respect to Virginia Ditty, Anderson asserts that her claim under § 523(a)(4) should be dismissed because there was no fiduciary relationship and no express or technical trust. Anderson asserts that there was merely a debtor/creditor relationship between Virginia Ditty and Paradyme. Anderson also contends that Virginia cannot support a claim for embezzlement under § 523(a)(4) because the complaint does not allege that Anderson misappropriated money belonging to Virginia; rather, it alleges that Anderson misappropriated funds belonging to Paradyme. Anderson further asserts that larceny cannot be established because there are no allegations that Anderson took the plaintiffs' money.

Anderson contends that the § 523(a)(6) claim must be dismissed because the plaintiffs have not alleged any injury to their property, nor any willful and malicious conduct.

Anderson also asserts that the plaintiffs lack standing because corporate creditors lack standing to pursue a nondischargeability claim against a chapter 7 debtor who was an officer of the corporation.

B.

Chris Ditty asserts that Anderson promised him that he would be an equal partner in the business. However, the papers to make Chris Ditty an equal partner were never prepared. The plaintiffs contend that the line of credit obtained by Virginia Ditty was to be for the sole use of Paradyme and that the loan was to be repaid within two years. The plaintiffs contend that in 2004, Anderson began embezzling funds from Paradyme. The plaintiffs assert that Anderson

misappropriated more than \$300,000 from Paradyme, depleting its assets and preventing the repayment of Virginia Ditty's loan. The plaintiffs also assert that Anderson's actions resulted in Chris Ditty losing his job, benefits, and valuable business opportunity.

The plaintiffs assert that they will attempt to pierce the corporate veil and find Anderson liable for his fraudulent acts to the detriment of Virginia Ditty.

III.

The parties did not provide copies of the state court complaint or the state court default judgment. Both would have been helpful to the Court in determining the basis for the judgment debt.

As stated, the adversary proceeding complaint seeks a judgment of nondischargeability of debt pursuant to § 523(a)(2)(A), (a)(4), and (a)(6). However, because the debtor did not obtain any money from Chris Ditty, the § 523(a)(2)(A) claim is dismissed as to him.

With respect to the § 523(a)(4) claim, the plaintiffs allege that Anderson embezzled funds from Paradyme resulting in a loss to the plaintiffs. Federal common law defines embezzlement as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996)(citations omitted).

Anderson contends that this claim should be dismissed because the plaintiffs have not alleged that he embezzled their money, they allege that he embezzled Paradyme's money.

The Court must dismiss this claim. Even if the plaintiffs are able to pierce the corporate veil, there has been no allegation that Anderson embezzled the plaintiffs' property.

Anderson asserts that the § 523(a)(6) claim should be dismissed because the failure to repay

a debt is not a willful or malicious injury. Anderson's request for summary judgment as to this count is denied. The plaintiffs have not merely alleged the failure to repay a debt. Chris Ditty alleges that Anderson's actions resulted in loss of his job, benefits and business opportunities.

Anderson also contends that Chris Ditty should be judicially estopped from asserting any interest in Paradyne because Chris filed bankruptcy in 2004 and did not list any interest in Paradyne.

“Judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding.” *Pennycuff v. Fentress Cty. Bd. of Ed.*, 404 F.3d 447, 452 (6th Cir. 2005) (citation and internal quotation marks omitted). Judicial estoppel “protects the integrity of the judicial process by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (“*NH*”) (citation omitted).

While “there is no set formula for assessing when judicial estoppel should apply,” *In re Cmnwlth. Inst. Secs., Inc.*, 394 F.3d 401, 406 (6th Cir. 2005) (citing *NH*, 532 U.S. at 750), the Supreme Court has set forth three factors for us to consider. “First, a party's later position must be ‘clearly inconsistent’ with its earlier position,” *Pennycuff*, 404 F.3d at 452-53 (quoting *NH*, 532 U.S. at 750), and the earlier position must have been taken under oath. *Valentine-Johnson v. Roche*, 386 F.3d 800, 811 (6th Cir. 2004) (citation omitted). Second, we consider “whether a party had successfully persuaded a court to accept his previous position, ‘so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that the first or the second court was misled.’” *Pennycuff*, 404 F.3d at 453 (quoting *NH*, 532 U.S. at 750) (citation and some quotation marks omitted)). Finally, we consider “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Pennycuff*, 404 F.3d at 453 (quoting *NH*, 532 U.S. at 751).

Wical v. The Intern. Paper Long-Term Disability Plan, 2006 WL 2042892, *10-11 (6th Cir. July 20,

2006).

The Court concludes that there are genuine issues of material fact as to whether judicial estoppel applies. That Chris Ditty may not have disclosed an interest in Paradyme in his bankruptcy schedules, may not be “clearly inconsistent” with his position here that Anderson promised they would be equal partners.

Anderson also contends that the plaintiffs do not have standing to sue him because they are merely corporate creditors. The plaintiffs have a judgment against Anderson and thus have standing to sue to determine whether that judgment is nondischargeable.

Accordingly, the Court concludes that Anderson is entitled to summary judgment on the § 523(a)(2)(A) claim asserted by Chris Ditty and the § 523(a)(4) claim in its entirety. The remainder of Anderson’s motion is denied.

NOT FOR PUBLICATION

Entered: August 18, 2006

/s/ Steven Rhodes
Steven Rhodes
Chief Bankruptcy Judge